1990/871P

THE HIGH COURT

UNITED STATES TOBACCO (IRELAND) LIMITED

AND

UNITED STATES TOBACCO, INC.: Plaintiff

IRELAND, THE MINISTER FOR HEALTH

AND

THE ATTORNEY GENERAL: Defendants

ACTION HEARD BEFORE MR. JUSTICE BLAYNEY
ON NOVEMBER 27, 1990, AND FOLLOWING DAYS.

TRANSCRIPT OF EVIDENCE ON NOVEMBER 28, 1990:

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I hereby certify the following to be a true and accurate transcript of my shorthand notes of the evidence in the above-named Action.

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I N D E X

WITNESS:	EXAMINATION:	QUESTION NOS.
John Walter	Direct - Mr. Fitzsimons	1 to 86
	Cross - Mr. Gleeson	87 to 295
	Re-Direct - Mr. Fitzsimons	296 to 298
Alphonsis Walsh	Direct - Mr. Gleeson	299 to 303

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THE HEARING RESUMED AS FOLLOWS ON THE 28TH NOVEMBER 1990

MR. FITZSIMONS: I was My Lord, in the process of opening the pleadings and was about to commence reading paragraph 7 of the defence, My Lord.

MR. JUSTICE BLAYNEY: Yes

MR. FITZSIMONS: The defendant's claim is "that a total prohibition on such a trade....." (quoted). The reference to total prohibition there, My Lord, is interesting, is consistant with the earlier plea at paragraph 5 where it is suggested that the Act constitutes a total restriction on trade and it may be, Your Lordship will recall my argument about the measure being one which should be treated as a single measure instead of a several measure. It may be that the State accept that submission.

Paragraph 8, "the defendants do not admit...." (quoted). Now, we would regard this plea of significance. It is not a denial, My Lord, and the State simply requires us to produce evidence on the topic, presumably evidence that would not be contested. That at least is a inference that one could draw. By the same token presumably the State could produce evidence. That proposition is not in issue in this case. It is not denied.

(Continued quote). That of course is entirely consistant with what preceeds it.

Paragraph 9. "The defendants deny that the provisions of Section 6 of the Act of 1988....." (quoted). (Quoted paragraph 10). (Quoted paragraph 11a). Your Lordship will note the word "all". Now, it's implicit certainly in this plea that the defendants accept that some smokeless tobacco products are covered, are intended to be covered by the provisions of the Council Directive. Presumably, Your Lordship will have submissions, no doubt, in due course in support of the proposition that our type of smokeless tobacco products instead of other types are not covered by the directive. And then 11b. (quoted 11b)

There is one request for particulars, My Lord, and the reply, notice for particulars, dated the 19th of January, 1990, replied to quite recently, on the 13th of November, 1990.

First query, "Furnish detailed particulars...." (quoted). Well I had better read out the first five paragraphs because the first reply is a reply to all

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of them together. (continued quote). These five are replied to as follows. (quoted).

This is important, My Lord. This is a clear acceptance of the fact that the material statute is a technical regulation. "Relating to the product....." (quoted). And moving on to query 6, that letter, of course, post dated the coming into force of the Act and we are not contending that, that on the basis of our submissions it is of course irrelevant to the case made by the plaintiffs as what is at issue is the non-notification of the draft provisions.

6B, "Copy enclosed herewith." Now, My Lord, a letter here is enclosed which is of particular significance, I think. And I think Your Lordship has a copy there of the letter of 22nd of July, 1988 from the Department of Health to Monsieur Raisone who is a director of D-J - -. "Dear Mr Raisone....." (quoted).

Now here is the passage to which I particularly draw Your Lordship's attention. "Our concern with the proposed directive...." (Quoted). Now, the directive being referred to there, My Lord, is not the notification directive, it's the labelling directive which, the 1989 labelling directive which I opened to Your Lordship yesterday. So in draft, at that point in time, the department accepted that it was not compatible with the legislation. Now, of course we don't know what state it was in then. "However now that Ireland....." (continued quote). "I have examined", and again this is important My Lord, "I have examined the proposed wording and on the phase of it....." (quoted)."

Now, My Lord, of course we don't know what happened afterwards. We don't know what negotiations took place. We don't know what was giving rise to the difficulties mentioned in this letter. But what we do know from this letter is that in July, 1988, after this Act was passed, community policy was not in accord with the policy of the Irish Government in this area and that draft legislation then being prepared was incompatible with the Act at issue and of course I have submitted yesterday that the labelling directive in its final form is incompatible with the Act and this letter would certainly give some sort of support to that argument.

Those, My Lord, are the pleadings. Now, the evidence, My Lord, I now propose to call Mr John Walsh, a senior official of the plaintiff companies,

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to give evidence, effectively to establish locus standi and give evidence in relation to companies activities in Europe. I have spoken with my friend and I think he accepts that he'll then follow and call his people in relation to the Article 36 and possibly Cassis de Dijon argument. I will then follow by calling my witnesses object on the health issue generally, scientific controversy. This is all subject, of course, to Mr Connolly's position. He won't be here until Friday. We know that. I think the matter will move fairly quickly.

My Lord, I have taken a lot longer than I thought I would have taken. I would like to apologise for that but I would like to think that in my submissions I have broken the back of the case in establishing the issues and the law and I think I have covered a lot of ground that my friend might otherwise have had to cover.

MR. JUSTICE BLAYNEY: Yes. Well, there is no need to apologise, Mr. Fitzsimons. You have set the matter out extremely clearly.

MR. FITZSIMONS: Just one final matter. We are getting an overnight transcript and we can make a copy available to your Your Lordship in as far as it might be of assistance.

MR. GLEESON: Yes. We want to share that on the usual terms if it's going to be available to the court.

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JOHN WALTER HAVING BEEN SWORN WAS EXAMINED AS FOLLOWS BY MR. FITZSIMONS:.

Q1 Now, Mr Walter, I think you are a director, a company secretary of first named plaintiff United States Tobacco Ireland Limited?

A That is correct.

Q2 And I think you are the director of International Government Relations of United States Tobacco International Inc., the second named plaintiff?

A That is also correct.

Q3 Now, just to run through the formal matters. I think U.S.T.I., that's Inc., is the international subsidiary of United States Tobacco Company which is a U.K. corporation with headquarters in Greenwich, Conntecticut?

A Correct.

Q4 And United States Tobacco Company is in turn a subsidiary of U.S.T. inc.?

A Yes.

Q5 And apart from the tobacco business the group's operations include wineries, wine business and video entertainment?

A Yes.

Q6 And I think the group also markets a variety of tobacco products, including pipes, pipe tobacco, cigars, cigarette papers and smokers accessories?

A We market most cigarette products with possibly the exception of cigarettes.

Q7 I think you can confirm that about 90% of tobacco sales within the group is within the smokeless tobacco market?

A That is correct.

Q8 And the group markets both dry snuff and moist snuff products?

A Yes.

Q9 Now, in relation to the brands of moist snuff marketed by the group, samples have been put in court. Could you just identify them. What are the leading brands?

A We have two primary brands.

MR. JUSTICE BLAYNEY: I left them in my room but, however, they will be brought here.

A It's Copenhagen which was first introduced in 1822 and Skoal which was introduced in 1934. We have subsidiary brands from Skoal in the name of Skoal Longcut and Skoal Bandits.

Q10 The Skoal Bandits appear to be a product produced in a slightly different form from the other products?

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A Yes, it's in a porous paper, I think you said yesterday, rather like a tea bag. Originally introduced, developed in the 70's for people with problems such as ill-fitting dentures.

Q11 Since when has it been marketed in this form by U-S tobacco?

A U-S tobacco have introduced what we call portion packed products in the late 70's and the brand, Skoal Bandits, was first brought in in the early 1980's.

Q12 In 1985 did the second named plaintiff establish a manufacturing and packaging facility in East Kilbride, Scotland?

A Yes.

Q13 Would you tell us about that. How did that come about and what did it involve?

A The company were looking to establish a facility within Europe which would be a packaging, warehousing and production facility to service our international business. We were encouraged by the British Government to locate within the U.K.. Ultimately it came down to a choice between Wales and Scotland and through the encouragement of the Scottish office we located in East Kilbride.

Q14 Did the second named plaintiff at the same time establish its European headquarters in Britain?

A Yes. We set up originally in Pickadilly in Central London and laterally moved to Kingstown.

Q15 Just to digress for a moment, samples of the products have now been produced, and could you identify them?

A They are exactly as I described, Copenhagen introduced in 1822, Skoal introduced in 1934 and the two subsidiary brands, Skoal Bandits, the portion packed product and Skoal Longcut. (Four tins handed to Mr Gleeson by witness).

Q16 When the English operation was set up, from where did it get its tobacco?

A The tobacco was imported from the United States into East Kilbride.

Q17 And can you tell us about the production and marketing of tobacco that was transformed into these products in Scotland?

A The product was, as I say, shipped in various forms, Either as bulk tobacco, some as a pre-packed product, and then either manufactured or shipped on to our various markets in Europe, the Middle East and Scandinavia.

Q18 Speaking about Europe, the European Economic Community, in particular, in what countries did it

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have a market?

A To my memory, I think our products have been available in at least 8 Member States, France, Italy, Belgium, Netherlands, Germany, Denmark, I am not sure if I have said up to 8 yet but that's a broad cross-section.

Q19 Will you tell us now, moving now to the first named plaintiff, U.S.T. Ireland, when was it set up?

A In early 1988.

Q20 And what was the purpose of --

A The operation was established to effectively act as our sales operation here in the Republic of Ireland, to market our products.

Q21 What was the intention of the company in relation to entering the Irish market?

A To place our, some of our smokeless tobacco products on the Irish market.

Q22 Was this the first occasion on which U.S. Tobacco had shown a interest in the Irish market?

A No. In 1985 we made some tentative investigations into the situation here in Ireland. That was somewhat curtailed though by the action of the Irish Government in late 1985 to ban our portion packed product.

Q23 Just to deal with that for a moment, when you say that tentative steps were taken, what precisely did that involve?

A At that time we were dealing with a local tobacco company and in liaison with our people in our management office in London, they had made enquiries of the Irish authorities as to the requirements for importation of our smokeless tobacco products.

Q24 Had they been in correspondance with the Irish markets?

A Yes, there was some correspondance.

Q25 And were there discussions between the Irish firm, I think it was Tobacco Distributors Limited?

A That is correct.

Q26 Foxes?

A Yes. Yes, there was both correspondance and conversations.

Q27 And what happened then?

A During the course of, to my memory, during the course of these conversations with our Irish, potential Irish importer, the indications were that there should be no problem with the importation of our product and the first we heard there was a problem was, I think, when we were given a newspaper in early

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January, 1986 and saw that these products or portion packed products had in fact been prohibited in Ireland.

Q28 Was any reason given to you directly?

A No, there was absolutely no consultation with us at all before the action was taken.

Q29 Was there any warning of the action?

A No.

Q30 That ban, I think, was set aside subsequent to the institution of proceedings?

A Yes, the court case, I believe, took place again in 1987 and a judgment was delivered I think September, 1987.

MR. FITZSIMONS: That's the one I referred Your Lordship to.

MR. JUSTICE BLAYNEY: Yes, in the U.K.

MR. FITZSIMONS: No, in Ireland, My Lord.

Q31 MR. FITZSIMONS: Turning to smokeless tobacco products in general, can you give us, I know we have, I have spoken about it in opening, but can you by way of evidence, tell us what smokeless tobacco is?

A I will try and keep it short. The basis is that it's obviously any product that's not combustible. It's the oldest form of tobacco and obviously predates cigarettes. Smokeless tobacco in various forms is available in virtually every European market.

There are two primary forms, what we call chewing tobacco and snuff. Chewing tobacco comes in three subdivisions. The descriptive terms are almost self-explanatory. Loose leaf dried, dried leaves, twist or pigtail, this is where the tobacco is woven into a long strand, for example miners tend to use this where they can hold one end with dirty hands and not with the section that goes in their mouth. And the last is a plug which is a solid block of tobacco where the user cuts a piece and places it in their mouth. That is often used in Europe where it is a small pre-cut pellet. The other derivative is what we call Scotch or dry snuff. Scotch or dry snuff is used nasally and orally depending on which market you go to. Moist snuff is used primarily orally although there are instances in, I am certain, one European market where there are moist snuff products that are used nasally. So there is a tremendous interchanging of usage patterns.

Q32 Are there different types of moist snuff?

A Moist snuff comes, I suppose, in two forms. One is [illegible] the other is cut. So it's really how the

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tobacco is sliced up. That's the primary difference.

Q33 The smokeless market tobacco today, where is, where does one find --

A Well, you will find smokeless tobacco in various forms, as I say in virtually every, probably world market, I can speak for Europe, in virtually every European market. The two large markets, I suppose, are Scandinavia and North America.

Q34 In terms of manufacturers, are there many manufacturers of smokeless tobacco in Europe?

A Yes, there are.

Q35 The E.E.C.?

A Yes, there are. Moist snuff, I am aware of three markets where moist snuff is produced. We have the U.K. Belgium and Denmark, and then a range of other smokeless tobaccos, I am probably aware of half a dozen in the Netherlands, France, Germany, there are several, I mean, yes, there are lots across Europe, but small, not large.

Q36 You referred to the two largest moist snuff markets as being the United States and Scandinavia. Taking the United States, first of all, is there any particular part of the United States where one finds it?

A Traditionally I am told that smokeless tobacco products range through what we call the sun belt, that's where, I believe, the bulk of the usage is which is the southern states primarily.

Q37 And Scandinavia?

A There is a, in Norway, Denmark and Sweden there is a long history in these products. Denmark, I am told, has up to 30 years of moist snuff history and Sweden approximately the same, but the largest market is Sweden, in fact I am told the per-capita consumption of moist snuff in Sweden is greater than North America.

Q38 You have told us the company set up in Scotland and, did you refer to it setting up its European headquarters in the U.K. in 1985?

A Yes.

Q39 Did something happen on the 13th of March, 1990 which altered the position insofar as the U.K. was concern?

A Yes, it did. The British Government put into force, I believe what is called, the Oral Snuff Safety Regulations whereby selected smokeless tobacco products are prohibited.

Q40 Has that ban or is that, are those regulations being challenged before the English courts?

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A The answer is they have been and they are. The Government, the British Government's view was that these regulations covered production for export. I believe it was March of this year when we challenged that particular aspect of the prohibition and the court upheld our challenge ruling that the prohibition does not cover production for export within the U.K.. The challenge to the full prohibition has also recently taken place in the British courts and I am told the judgment will be delivered in due course on that case.

Q41 Until the 13th of March, 1990 U.S.T. had of course been carrying on business from the U.K.. To what E.E.C. countries was it exporting its products?

A Denmark, Belgium, Netherlands, France, Italy, Germany, those are the ones that immediately come do my mind.

Q42 What happened upon the coming into force of the regulations to the Scottish operation?

A We effectively closed down the operation and the staff regrettably were made redundant and the factory was put into mothballs.

Q43 When you say being put into mothballs, is that pending the result of the proceedings that are currently in course?

A Yes, it is.

Q44 Turning to Ireland and U.S.T.'s plans for carrying on business here, you have told us about the Irish company getting going in mid-1988. Did that company import products into Ireland?

A Yes, it did. We shipped in Copenhagen and Skoal Longcut and sold those in various towns throughout the Republic.

Q45 I think they were brought in on the 8th of July, 1988.

A That is correct.

Q46 I think the position in relation to sales is that sales were made on the 11th of July, 1988 but were not carried through then because of the ban being brought in?

A Yes, I think we heard on the 14th of July the law became effective and we, needless to say, ceased operations immediately.

Q47 Where were sales made in Ireland?

A Towns that I recall, Dublin, Waterford, Killarney, I believe Shannon, Ballymena, those are the names that I can recall. But there were probably, nine [illegible] believe we sold them in.

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Q48 Now, I think in fact a further 2 cases were flown in on the 14th July, is the '88, the actually day?

A Yes, the court order was placed and on what I call the pipeline effect, these two cases were shipped in the day of prohibition but we didn't take any action with those two cases.

Q49 The ban pursuant to Section 6 of 1988 Act was introduced on the 14th of July, 1988, has U.S.T. complied with that fully.

A Yes.

MR. GLEESON: I accept that.

Q50 MR. FITZSIMONS: Was U.S.T. contacted by the State or any agent of the State to warn it of the intention to introduce legislation of that type or to give you U.S.T. reasons for it?

A No. Again there was no warning or consultation. We wrote a letter on the, I think it was the 20th of July and received a reply from the Department of Health sometime in September then containing a copy of the Act and then I think there was a further letter from the Revenue Commissioners sometime in November.

Q51 You are aware, I don't think it's necessary, My Lord, to bring the witness through the correspondance. You are aware of that exchange of correspondance?

A Yes, I am.

Q52 I want to just, there is not much left, but briefly bring you into a broader area. Are you familiar with the term "lifestyle products"?

A Yes, I am.

Q53 What does that term connote?

A To me it means products that are available in society within general use that have allegations of hazard associated with them, examples could be dairy products, red meat, tobacco, alcohol.

Q54 Can you give me some other examples?

A I'd have to be stretching my thought process a bit.

Q55 What about eggs?

A Yes, cholesterol, products containing cholesterol.

Q56 Caffeine, sugars, sweetners, chocolate?

A Yes.

Q57 And so on. You can speak with some authority on this topic. How do Governments throughout Europe, I am concerned with Europe, deal with these products, in terms of controlling their availability?

A Primarily it would appear to me to be through warning, warning statements on some of the products, restrictions on the sales, age limits and so on, and

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of course certain controls in some cases on the source of purchase and controls on the advertising and promotional vehicles available to those products.

Q58 Do you, viewing lifestyle products from your particular view point, see any distinction between the position in relation to them as compared to your company's product?

A No.

Q59 Turning to tobacco products in general, including of course moist tobacco products, can you say from your experience, what is the regulatory position in other countries throughout the E.E.C.?

A Primarily, obviously there are, to some degree 12 disparate nations within the E.E.C., but primarily it seems to be treatment alongside, equal treatment alongside other tobacco products and those restrictions to tobacco products vary from member state to member state.

Q60 Is there a ban on such products anywhere within the E.E.C. other than in respect of smokeless, oral smokeless tobacco products here and of course the English regulations to which you have referred?

A There is a proposal within Belgium which is subject of a royal decree that has not yet been published and is therefore not an official document. We are told it will prohibit this particular product, the portion packed.

Q61 Skoal Bandits?

MR. GLEESON: Sorry which product is that?

MR. FITZSIMONS: Skoal Bandits.

A Well, it's the portion packed products, not the product Skoal Bandits. But that has not yet been published so it's not an official piece of legislation.

Q62 And does that ban come across the other products?

A No.

Q63 Is there any other ban or potential ban, or is there any other ban in place that you are aware of?

A Not to my knowledge.

Q64 Are there rules and regulations governing the sale, distribution, advertising of these products in other E.E.C. countries?

A Yes, they are wide, vary again from state to state, but, yes, they do exist.

Q65 Well, very broadly, what are they, are they similar, for example, to our rules?

A Yes, some are stringent, in some States there are more stringent rules applied here than in Ireland.

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For example, in Belgium all tobacco products have to be licensed. In France some tobacco products are restricted to what they call private venues. In Sweden some tobacco products are restricted to tobacco outlets. In France and Italy point of sale in outlets is very very restricted. In Italy, and I think it's Portugal, all tobacco licences are restricted. So there are a range. In Sweden the size of tobacco advertisements have control. You can't have a full page advertisement, for example. So there are a range.

Q66 Now, I wish to turn now to the position of the sale of tobacco products to young people. We know that in Ireland the law prohibits the sale to, of tobacco products in general, to people under the age of 16. Is there a similar rule in other European countries or is the age limit different?

A To my knowledge there are only three States within the community that currently have a law on minimum age. I think it's Spain, the U.K. and Ireland. They all have the age of 16 at this moment.

Q67 I see. What is, does U.K. Tobacco have a policy in relation to the sale of oral smokeless tobacco products?

A Yes.

Q68 To young people?

A Yes, it does.

Q69 What is that policy?

A The company has a long standing policy, both domestically and internationally, that our products are targeted to adults aged eighteen and over.

Q70 Is there a company code in that regard?

A Yes, there is.

Q71 Is this a copy of the code? (Document handed to witness and court).

A Yes, yes, it is.

Q72 Headed "Sampling, Sampling And Promotion. Sampling code....." (quoted). And then it goes on down effectively to anyone issued with this. "Since the company....." (quoted).

Now this document refers to sampling. What about sales?

A Sales are the same. We encourage our retailers to, as much as is within our control, to sell our products to customers aged eighteen and over.

Q73 Is that policy one that operates in a single market or is it operated everywhere?

A Now, I have been aware of it from the day I joined

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the company and part of any job has been to assist in educating any employee who comes into the company on this and it has been a long standing policy in all of our markets.

Q74 When the company opened up in the U.K., did it enter into an agreement with the U.K. Government, a term of which was the implementation and operation of this policy in relation to sale to young people?

A Yes, this was a fundamental part of the agreement with the British Government.

Q75 I think that agreement was entered into in April 1985 and revised later on the 14th of November, 1989?

A That is correct.

Q76 Can you tell us whether or not that policy has been successful or are you in a position to say so within the U.K. and Europe?

A Yes, we have received no comment from the British Government that they believe we have in any way breached this policy.

Q77 Turning to the health issue, it is accepted that there are people, many, there is a case, to put it at its broadest, a case made against this product based on the proposition that it is a risk to health. Now, what is the position of U.K.T. in general, including the plaintiffs in this action, to that case?

A It is the company's view that smokeless tobacco has not been scientifically established as the cause of any human disease.

Q78 MR. JUSTICE BLAYNEY: Has not been established as the cause of?

A Any human disease, My Lord.

Q79 MR. FITZSIMONS: As the cause?

A As the cause, and we believe it is a scientific controversy that exists on the issue.

Q80 Does U.S.T. make health, other than taking that position, does U.S.T. make health claims about its products?

A We do not. And in fact is one of the parts of the agreement that was incorporated in our voluntary agreement with the British Government.

Q81 So there is no question of U.S.T. ever seeking to go market it's policy in away that would suggest to anyone that it's product is, well, I am -.

You are aware of the Irish code of legislation relating to tobacco products?

A Yes.

Q82 And of course a similar code in the U.K.?

A Yes.

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Q83 What is your view as to the effectiveness of such a code of legislation, whether in its present form or possibly amended to make it more rigorous, what is your view as to its effectiveness, compared to a ban?

A Well, I can say to that that first of all, the second part of your question, there are obviously other, if one goes around Europe, there are other things that are done in Europe to regulate tobacco products that are not done here. So there could be more things done here. The Irish Government obviously choose not to do those things.

One example is a advertising ban in some Member States. There is not a advertising ban here. I can only assume that the level of legislation that the Irish Government choose to introduce is deemed to be suitable to meet their objectives in controlling tobacco products.

Q84 Well, to deal with the first part of my question, do you consider that this code is an effective way of dealing with any perceived risk to health?

A I must assume so. I mean, they, they seem to have had it around sometime. I mean, there have been various, since, I am aware of, since 1986, three pieces of legislation and again I must assume that they were deemed to be effective and they are an effective.

Q85 Do you see any logic in the introduction of the ban in respect of this product?

A No. The thing that did surprise me was, in 1986 I believe there was an introduction of a warning label on chewing tobacco, but at the same time there was obviously, I assume, no perceived need to label our moist snuff tobacco products because they were left untouched for two years until 1988 when the Tobacco Health - - and Protection Act came in banning those products. That did surprise me.

Q86 Of course just on that point, as I think you have referred to earlier, the 1985 ban which was operative during part of that period effected only Skoal Bandits and not the other, Copenhagen, Skoal Longcut, etc.?

A Yes.

THE WITNESS WAS CROSS EXAMINED AS FOLLOWS BY MR. GLEESON:

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Q87 Mr Walter, I'd just like to get a slightly larger impression of what your position as manager of International Government Relations involves. What's your brief or the range of your duties or,

A It is primarily to monitor regulations that can affect our companies, the marketing of our products internationally.

Q88 And you keep yourself informed of legislative changes and developments and regulations and so on in the different jurisdictions?

A That is correct.

Q89 Is that principally in Europe, I take it?

A Principally in Europe, yes.

Q90 And you would interest yourself then in, obviously in plans that the different Governments would have to change their regulations or suggestions they might be making, as best you can find?

A As best I can, yes.

Q91 You are interested, obviously, you were speaking of the Belgium experiment. But also proposals that you may come across in relation to possible changes. Is that so?

A Sometimes, yes.

Q92 It depends upon, I mean, obviously there are 12 disparate nations. It's very difficult to monitor all 12?

Q93 Of course. But you would be keeping your ears and eyes open in a perfectly proper way to know what's moving in your area?

A That's my endeavour, yes.

Q94 That's your brief?

A Yes.

Q95 And would you be anxious, I suppose, to pick up press briefings and so on, that Government said we are requesting today X change or Y change. That's the sort of area you would be interested in?

A Of course, yes.

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96 Q. I know there was litigation in relation to the steps that were taken under the Consumers Protection Act in the United Kingdom and you have discussed that with Mr. Fitzsimons. Some of that litigation has been heard and some of it remains to be heard?

A. No, both hearings have now taken place.

97 Q. But there has been some adjudication on a preliminary issue or a part of the claim?

A. Yes.

98 Q. And I think that adjudication was in your favour?

A. Yes.

99 Q. Do you have some professional qualifications? Are you a scientist?

A. I am not a doctor or a scientist of a lawyer.

100 Q. And are you broadly familiar with the litigation in the United Kingdom and the relations that flow between the Government and your company in that?

A. In the broader sense, yes.

101 Q. I take it you are not a scientist. You are not into the scientific controversy, apart from being aware of it?

A. That's right, yes.

102 Q. But you would be aware of any information that would come through those proceedings that relate, for example, to the intention of the European Commission in this area?

A. I would hope so. I have discovered the European Community is a disparate body.

103 Q. Were you aware of a letter that appeared as an exhibit in the United Kingdom proceedings, which was a letter from the Commission of the European Community addressed to the Assistant Secretary in the Department of Health, but it was brought in as an exhibit and which indicated that the Community proposes..... First of all, that is it?

A. I am aware of that letter.

104 Q. Would you identify that? It is a letter from Riccardo Perissich. I will hand Your Lordship a copy of that. This was, I think, in response to a specific inquiry

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from the relevant specific secretary in the United Kingdom. There was an inquiry as to whether there was a Community intention about moist snuff or oral snuff products?

A. That is what I understand.

105 Q. Could you read paragraph 3 please?

A. "For this reason and because of....." (Quoted).

106 Q. I think that is paragraph 4.

A. "As it is intended to propose a Community....." (Quoted).

107 Q. And perhaps you would read the next paragraph as well.

A. "For this reason and because of obvious danger..... U.S. Tobacco International". (Quoted).

108 Q. And, in the same vein, are you aware of a press release on the 14th of this month from the Commission confirming that that step is now to hand?

A. I am aware, I believe it was the 14th.

109 Q. Perhaps I could show you a copy. You will find it is duplicated. The press release is at the back but it doesn't come out very well. For that reason it has been typed out again.

A. I am aware of that. This is a proposition for the Council, for the Commission, that would - I believe - is predicated on the basis of whether to harmonise the prohibitions of the United Kingdom and Ireland at Community level. That is my understanding.

110 Q. Perhaps you could read it.

A. The whole thing?

111 Q. If you would?

A. "Smoking is still a major..... second opportunity". (Quoted).

112 Q. Oral moist snuff - is that the product you produced this morning?

A. Yes.

113 Q. Carry on.

A. "At this time we must not miss..... before it is too late". (Quoted).

114 Q. And when would you have first sight of that document?

A. Towards the end of last week.

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115 Q. And the letter from Mr. Perissich to Mr. Burroughs, you would have seen that some months ago, I take it?

A. I would have thought so. I can't remember the date.

116 Q. Why did you tell the court this morning, when you were asked as to whether you were aware - apart from the proposal in Belgium and the position in the United Kingdom and Ireland - whether you were aware of any sort of potential ban or ban, and you said you were not.

MR. FITZSIMONS: I put that question in the first place but then altered it to say "Was he aware of any other bans" and the witness answered that question.

A. That is the point I was going to make, and I did ask, in fact, whether there were new bans.

117 Q. MR. GLEESON: And the ban that you referred to in relation to Belgium was a potential ban?

A. It has not yet been published, as I understand it.

118 Q. Do you think we would have had a fuller impression of Europe if you had mentioned this proposition from the Commissioner during your own direct evidence?

A. My answer must be no in answer to the question. This is a proposal that has to go through the procedural mill of the E.E.C. and it is only at this stage a proposal. It is also predicated on the basis of whether it is harmful, the actions taken by two member states, which are the subject of legal challenges.

119 Q. The legal challenges we are concerned with, Mr. Walters, you would be aware of the challenge to your company initiated in different jurisdictions?

A. Yes.

120 Q. In which jurisdictions have such challenges been mounted?

A. To my memory, I think we have covered the United Kingdom and Ireland. I am aware of a challenge in Australia. Those were the ones I can recall.

121 Q. Has there also been litigation under the '74 Trade Act in the United States in relation to the British Action in banning these products? This is a GATT -

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A. I believe we had investigated that situation but I don't think we have taken any actual steps to put -

122 Q. This was that the United States were breaking the GATT agreement -

A. Yes.

123 Q. Am I correct in saying that this is under way under the Trade Act in the United States?

A. Yes.

124 Q. What is your policy in relation to the conduct of litigation in relation to bans which are put in place?

A. I am not aware of a specific policy broadly in relation to that.

125 Q. I don't want to go into any details in relation to the United Kingdom proceedings, all the more so because you are not a lawyer, but I just want to understand that the challenge that has been heard and disposed of in the United Kingdom, it is on whether the United Kingdom government had powers within the Consumer Protection Act to make an Order of this kind. It was a trade variation or variations claim.

A. I understand that was part of it.

126 Q. And that is what has been adjudicated on, that the Minister was not entitled to make the Order he did?

A. On the first part of the hearing, that is it. But I understand on the second part of the hearing, it was how the Act was challenged -

127 Q. Has there been a judgment in respect of the second part of it?

A. No, not yet.

128 Q. So far as a decision has taken place, is it done on the understanding that, on the technical side, whether the British Order - under the Consumer Protection Act - was a lawful thing for the Minister to do?

A. That is part of the challenge as I understand it.

129 Q. Am I correct in thinking that the Consumer Protection Act in England is very broad? It is not just for tobacco, it covers other aspects as well?

A. I believe so, but I am not qualified to judge.

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130 Q. Very well. Could you tell us a bit more about how this product is used? As I understand from the description Mr. Fitzsimons gave us at the start, you put it between your gum and your cheek and leave it there - is that right?

A. You can. Some people -

131 Q. Switch it around a bit?

A. Yes. It varies from person to person. That is the broad thing.

132 Q. Mostly one would expect the average user to leave it in a single place?

A. I honestly don't know.

133 Q. You don't know how it is used?

A. I know it is placed in the mouth between the cheek and the gum. But, the number who leave it in a single place or move it around, I can't.

134 Q. Who could, in court, tell us how it is used?

A. I can't tell you.

135 Q. Looking around the court, you don't see anybody who could tell us how the product is used?

A. I think I have answered your question by saying that it is placed between the gum and the cheek but -

136 Q. Is there anybody in court who would know actually how you would use this product? Take a look.

A. No. I have to answer you the best way I can. My knowledge of it is to place it between your gum and your cheek.

137 Q. Have you ever used it yourself?

A. Yes, I have.

138 Q. What do people do when they place a bit of it? I assume you don't swallow it? I am not a smoker and I don't understand these things -

A. My understanding is that people..... What I do is to take the thing out and put it in a bin.

139 Q. In a?

A. In a bin.

140 Q. So, a bin would be a necessary part of the apparatus.

A. For me. But I can't talk for others.

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141 Q. What do people in the States and in Sweden do? Do they spit it out on the street?

A. They may.

142 Q. You have never heard of them doing it?

A. I have heard of people spitting, but I can't say what people do when they are finished with it.

143 Q. You can't tell me what happens to it?

A. Some people, in the main they would take it out and dispose of it. Where they dispose of it I can't say.

144 Q. Do people use two pieces at the same time?

A. From my knowledge..... The majority of people I know of, they would take one dip.

145 Q. The word "dip" is commonly used, I think?

A. In America.

146 Q. And the practice of sucking or chewing or using a Skoal Bandits is known in the United States as snuff-dipping?

A. That is becoming, in the United States, the collective term.

147 Q. Am I correct in understanding that the other snuff product in the United Kingdom and Ireland has a different meaning to its normal use in the United States?

A. Again, to a lot of people probably, snuff can be dry or nasal snuff.

148 Q. That's what it means to me. I have never heard of moist snuff before this case. But, is it your understanding in the United States do not confine their understanding of snuff to the dry snuff you get-

A. In the United States I believe dry snuff is called Scotch Snuff and it can be dry or moist.

149 Q. But, would you agree that the use of these is confined to the dry snuff that is nasally taken?

A. Yes.

150 Q. I know there are these odd distinctive patterns of use. I understand the breaking up of plug tobacco for use in a pipe is not widespread but it was widespread in Ireland and in Australia, but not elsewhere.

A. For using in a pipe?

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151 Q. Yes. The cutting of plug tobacco is, apparently, an Irish and Australian habit.

A. I honestly don't know. I know plug tobacco is available in the United Kingdom.

152 Q. Is there a European marketing strategy in relation to moist snuff?

A. I am not aware of any European marketing strategy. I think the way they introduce it is on the market by market basis.

153 Q. What would the men say, say they were saying "We're going to try this product in Ireland" - what sort of plans guide them?

A. My understanding - and I am not the person involved, I speak second-hand - is to really look at the profile of the tobacco market, for example, in some markets, most European markets that use smokeless tobacco - however small - and that can be a factor in determining how to market it.

154 Q. You indicated that there tends to be in other European countries a small moist snuff market, in the various countries you have mentioned?

A. Yes, I think there is, yes.

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You mentioned a number of countries, but you mentioned in most countries albeit a small market for moist snuff.

A. For smokeless tobacco generally, and in some cases moist snuff.

155 Q. Let's stick with the larger definition, the smokeless tobacco. This would include moist snuff or tobacco for the mouth.

A. Yes.

156 Q. I find the reference to snuff slightly misleading. There's moist tobacco or the tobacco that goes into the mouth in Europe, we're talking about the traditional consumption. Presumably, it was not in the tea-bag style then. That is a '70's development.

A. Yes, what I would call the loose thing.

157 Q. Before the '70's, take a look back at the European development before that came on the market - is it your understanding that oral tobacco was taken by having this moist snuff in loose form taken by mouth and also taking a piece of the plug in the mouth.

A. I can only guess because I'm not aware of the details pre '70's personally, but I would say loose tobacco was used orally in these communities.

158 Q. Do you want to suggest any evidence that there is an oral tobacco, an oral smokeless tobacco tradition in Ireland.

A. I am told there is a tradition of chewing tobacco here.

159 Q. We will be producing evidence that while there may have historically been one, that it has probably died out completely and, in a survey of 5,000 people, no single user of chewing tobacco was found. Is that your impression of it?

A. The statistical balance of a sample of 5,000, I don't really -

160 Q. Let me make it mundane. Has your company come across a resident of Ireland who uses oral smokeless tobacco? Do you know the name of one in the whole country?

A. No.

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161 Q. I want to suggest that - so far as my information goes and so far as your information goes - there is no traditional market of any size at all for the use of smokeless tobacco through the mouth in this country. If you have evidence to the contrary I would like you to draw my attention to it.

A. One thing I am aware of is that, during a debate in parliament, an Irish politician was dealing with Irish chewing tobacco. That is one reference. Beyond that, I don't know anything else.

162 Q. May we take it there is no evidence at all of a moist snuff, your product - leaving aside the habit of chewing a piece of plug or twist tobacco - that the habit of taking moist snuff is something which has no tradition in this country?

A. I'm not aware of any comment to support that there is a use or has been a use of moist snuff.

163 Q. And am I right that moist snuff is something which has a long standing use in Sweden and in the United States.

A. That is correct.

164 Q. And that doesn't have a long standing tradition anywhere else?

A. That is not correct. Denmark has a three hundred year history of this.

165 Q. Where else do you say there is a long standing habit of using moist ground tobacco in the mouth?

A. Again, without...it depends on what you mean by "Long standing". I'm aware of the product exported from Belgium to France, and this would be marketed as this product.

166 Q. As moist snuff?

A. I believe so.

167 Q. I want to ask you a little bit about the Irish operation, the Irish company that is involved - am I to take it that it doesn't have a significant existence? It is an Irish subsidiary?

A. Yes.

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168 Q. And it is there as a vehicle if you trade these products rather than having any significance at the moment.

A. That is correct.

169 Q. Does it have any staff?

A. It is staffed out of our United Kingdom operation.

170 Q. There would be some people from the United Kingdom operation that would have responsibility for it but I take it there are no Irish people working?

A. That is correct.

171 Q. And I take it it is essentially, it is dormant pending the resolution of these questions?

A. Yes.

172 Q. The word "Lifestyle" is one that is not very familiar to me. I didn't know about it until you explained what it meant. You indicated that it signified a group of products which had queries about their healthfulness.

A. Allegations of the possibility of a health hazard, yes.

173 Q. And you did mention meat and chocolate and milk. Is yours the only non food or beverage?

A. This is a difficult area for me because I'm not a scientist. But, recently I read in the Times that cling wrap film is a potential hazard now.

174 Q. But is that a lifestyle product?

A. Yes. For most housewives, it is part of their lifestyle and how they do, get their refrigerator stocked.

175 Q. The word "Lifestyle" seems to be a misnomer. It seems to be a euphemism for the opposite?

A. Within daily usage.

176 Q. But those products that are used within daily usage, they are, arguably, going to cause a threat to health.

A. Yes, allegations.

177 Q. There is a sportswear company in this jurisdiction called "Lifestyle". This connotation may not be as widespread in this country as it is in the United Kingdom, and I'm sure this sportswear company don't

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intend the connotation you intended. Are any of the other products that you mentioned...perhaps you could mention them again.

A. Eggs, milk, sugar, red meat, fried foods.

178 Q. Carcinogenic? Are they being suggestive of being carcinogenic?

A. Sorry.

179 Q. Are any of those suggestive of being causative of cancer?

A. I don't know.

180 Q. Have you read that?

A. I have heard that potatoes and mushrooms are linked to cancer, but whether that is right or wrong, I am not qualified to say.

181 Q. I want to suggest to you that, of the lifestyle products you mentioned, the only one in respect of which serious contentions are scientifically advanced that the product causes death or immature death are your products - do you want to say anything about that, Mr. Walters?

A. I don't think I am really qualified to do that. That is really an issue for scientists.

182 Q. That may be, but then we have the evidence that shows a distinction between milk, chocolate and meat and tobacco products, and I am asking you to state the degree of seriousness you put that forward to the court with? Are you serious?

A. yes, I am.

183 Q. Was there any time in your life when you felt there may be a distinction between milk and chocolate and meat and tobacco in terms of the effect they would have on the person's health? Is this a view you have always held, that they were indistinguishable in this aspect, or is -

A. I don't think I have said they are indistinguishable. I am not capable of distinguishing them.

184 Q. There is a difference. I'm not a scientist either and I can't make scientific distinctions. But, one has a different impression of the risk, as a layman, as an

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interested intelligent man. Are you telling the court, you say there is no distinction?

A. Not that I can quantify.

185 Q. I am not asking you to quantify. You said you saw no distinction between the lifestyle products of milk, chocolate, meat.

A. I know no measurable distinction that I could make in terms of the degree of hazard. All I know is that either product I read about can cause problems to the human business. The right or wrong, I can't argue.

186 Q. This court and any other court looking at this is to look at a product that is of the same order of safety that is attached to meat and chocolate and milk - that is your statement?

A. And alcohol.

187 Q. Do you think this court is concerned with a controversy of a product that is of the same order and in which no distinction can be drawn as in milk, chocolate and meat.

A. Any person...no distinction can be drawn. I said I can draw no distinction in degree. I see these as a group product in modern society that have allegations of various degrees of hazards attached to them. I am not capable of assessing the degree of hazard attached to them.

188 Q. Do you personally use Skoal Bandits regularly?

A. Not regularly.

189 Q. But you have had occasion to use it?

A. Yes.

190 Q. Are you a smoker?

A. I smoke cigars.

191 Q. We are here into the consideration of the dietary habits in the United Kingdom and Ireland, but I would think that milk and chocolate and meat are used very widely in the United Kingdom and Ireland.

A. I would think so.

192 Q. And Skoal Bandits is not used widely. There is no nutritional value in it.

A. It is not used as a food.

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193 Q. Is there any other product in the world that is used as a cud - as Mr. Fitzsimons said - put in the mouth and left there? Is there any other product in the world that is used that way?

A. I don't know. I'm not aware of it.

194 Q. It has a lot of consumption which is wholly distinctive to tobacco.

A. On the basis of the lack of it, I'm not aware of anything else.

195 Q. Do you know how long people typically keep it in their mouths?

A. No.

196 Q. Could you give us any idea?

A. I can speak from personal...I would personally, probably, keep it for twenty minutes.

197 Q. Do you think that that would be typical or would something more typical be six hours or four minutes?

A. I would be surprised by six hours. But I don't know. It is something that would be dependent on the individual.

198 Q. Is there anyone in court who would know about the length of time it is kept in the mouth?

A. I don't know.

199 Q. Does your company know?

A. Again, I don't know.

200 Q. In all your intersections with regulatory agencies and so on, have you ever come across suggestions from scientists that the duration in total - as opposed to the number of people - the duration for which a piece is kept in the single part of the mouth may be significant in connecting it with mouth cancer lesions at that point? Have you heard that suggestion?

A. In the broader sense, yes, but I can't be aware of it specifically.

201 Q. Given you are aware that there is some scientist or suggestion that the amount of time you leave this in the mouth in a particular place materially effects the risk of having cancer in that place, has it ever crossed your mind to inquire as to whether your

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company had any information about how long the typical user left it in their mouth? Has that ever been raised at any meeting or conversation? Has anyone talked about that within your hearing?

A. No, not to my memory.

202 Q. Do you know the age profile of people who use this product in the United States of America?

A. No, I don't.

203 Q. Is there anyone here who does?

A. Again, I must say I don't know.

204 Q. You use the term "Scientific controversy", and let me see what I understand - I understand there were some scientists, not necessarily medical scientists, who would say that it is not scientifically proven - is that so?

A. That is my understanding, yes.

205 Q. Are you aware of any medical doctor, human medical doctor in Ireland or the U.K. who says the opposite to that, who says that it is scientifically proven that there is no risk to human life or health?

A. I'm not aware of that.

206 Q. Are you aware of any doctor anywhere in the world not connected with your company who has stated in writing or said that these products are positively safe and are proven not to harm?

A. No. As I say, the scientific matters are not within my experience or jurisdiction, so I am not aware of these things. There is no reason I should be.

207 Q. Surely there is a reason that you should be. If you are dealing with international government regulations, wouldn't you be very interested if there was a doctor somewhere in the world, a reputable medical practitioner, who says these are dangerous - wouldn't that be interesting?

A. It possibly would be.

208 Q. Wouldn't it be very interesting to you?

A. It could be -

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209 Q. When you have discussions with a government or a lobby or have discussions with civil servants, do you ever draw to their attention scientific materials?

A. Not scientific materials as such. I make available information that exists.

210 Q. Published papers?

A. personally, not public papers. I have issued comments published by third parties.

211 Q. Medical doctors?

A. In some cases.

212 Q. Scientists?

A. In some cases.

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213 Q. When you say you shouldn't be interested in the question if any doctor says it is a hazard, surely that is not true? You are interested? That is your job.

A. Indirectly, the way I read your question is whether I have an interest in this - I am not an expert and I don't follow it out.

214 Q. But you are in your own job, the people you meet with are interested, and if there was a statement in The Lancet or the Medical Journal about this, you would be interested?

A. Hypothetically.

215 Q. So, may the court take it there is no medical doctor who takes the view -

A. I am not up to date on scientific knowledge and I am not aware -

MR. JUSTICE BLAYNEY: Wouldn't you be aware that..... Do you not think that if some doctor somewhere said this was a perfectly safe product, wouldn't you think that would be of enormous value to your selling your product?

A. On the basis that the company doesn't make health claims for those products..... Hypothetically, if that was the situation, we don't make health claims for our products and we wouldn't be in a position to use that piece of information.

MR. JUSTICE BLAYNEY: Are you saying if it was a health claim because it was safe -

A. I would assume so. I speak as a layman. I understand that it is not possible within science to prove safety, but I speak that as a layman, not as somebody who really knows the details.

216 Q. MR. GLEESON: You are aware, of course, that there are many doctors who say that these products are dangerous?

A. I am aware of such body.

217 Q. I am not asking you to give lists of them, but you are aware about the proposition that these products are dangerous, that they cause oral cancer - which is a

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very distressing business I believe - and that it can sometimes be fatal? That is asserted very authoritatively.

A. I am sorry.

218 Q. It is asserted very authoritatively.

A. Yes. I am aware of the allegations to that effect.

219 Q. Allegation is one thing. I want to suggest to you that, to a layman like you or I, non-scientists, non-doctors, that there are what any intelligent layman would regard, even not a very intelligent layman would understand there are very authoritative statements to the effect that these products cause cancer and may cause death. Are you aware of those authoritative statements from authoritative sources?

A. You are emphasising the word "authoritative". I am aware of allegations made at World Health conferences about these products.

220 Q. Do you wish to dispute the World Health Organisation and the General Surgeon of the United States statement? Do you wish to use a word other than authoritative in respect of the comments from those quarters?

A. Again, I am in a position where I am answering scientific matters that I am not ready to answer. My answer is that these allegations are made by these bodies, but I am also aware that there are eminent experts who hold a contrary view which leads me to view -

221 Q. Tell me the most eminent expert who holds the contrary view?

A. Again, I don't have a degree to say this -

222 Q. Tell me any.

A. Off-hand, I can't say. But that is testified on the record and, presumably, this is on the records.

223 Q. Is your position - as a layman - an informed and interested layman - that you wouldn't concede that the W.H.O. study that was set up to look at smokeless tobacco control, would you accept that that was an authoritative body?

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A. My understanding of that study group, it wasn't a W.H.O. study group. It was a study group held under the auspices of the W.H.O.

224 Q. Take a copy of this and see if it is -

MR. FITZSIMONS: My Friend is entitled to put documents to the witnesses so long, provided he is not trying to make the case that the content of these documents is now in evidence.

225 Q. MR. GLEESON: The content will be proved by one of the authors.

A. The title is "Smokeless Tobacco Control....." (Quoted).

226 Q. You said to me that this was not a report of the W.H.O. study group?

A. It was held under the auspices of the W.H.O.

227 Q. What are the next six words there?

A. "Report of the W.H.O. study group". They are not experts to my layman's knowledge -

228 Q. What do you wish to convey to this court by that last statement?

A. Nothing, merely to put on the record what I understand to be the facts concerning this report.

229 Q. Do you wish to make some point about their status?

A. I am not qualified to do that.

230 Q. And, if you could turn to Section 6 (1) of that? "The study group recommended that governments should ....." (Quoted). Leaving aside these semi-medicinal products that are referred to and the substitutes that help or are intended to wean people away from tobacco, there is no doubt that the proposal was for a total ban.

A. That is what this statement says.

MR. FITZSIMONS: If My Friend refers to 6(6)? I can't find 6(6).

MR. GLEESON: 6(1).

MR. FITZSIMONS: I beg your pardon.

231 Q. MR. GLEESON: We have a single copy here of the General Surgeon's document. Can you identify that document -

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MR. FITZSIMONS: I take it this will be proved too.

232 Q. MR. GLEESON: No. It will be proved as part of the literature. He concludes that "All snuffs are carcinogenic.....dependents". (Quoted). You are broadly aware he had this view of your product?

A. I am broadly aware of the statement.

233 Q. Do you have any, or does your company have any impression of the make-up of the population who use Skoal Bandits in the United States or Sweden in terms of age and sex?

A. I am not aware of any specific information on Skoal Bandits.

234 Q. Moist snuff then?

A. My information is that it is primarily used by blue collar people who work outdoors.

235 Q. I was not asking about the class of people, I was asking you about the age - do you know anything about the age?

A. I have no knowledge of the age profile.

236 Q. Have your company ever looked at that question?

A. To my knowledge, I do not know.

237 Q. There was a suggestion that Skoal Bandits were designed for people with loose dentures - did you hear that suggestion?

A. Did I hear it?

238 Q. Yes.

A. Yes.

239 Q. Is that what they are designed for?

A. That is my understanding, the original development. That was part of the development product.

240 Q. But is it true that that is not what they are primarily for now?

A. I understand in Scandinavian countries and I suppose, having met a man on an aeroplane - he was a sales director of a wood company - he told me he used the dry snuff when he was outdoors and the weekends but when he was working he would use the packet.

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241 Q. Is the reason for that that it is not socially as offensive as smoking cigarettes because people wouldn't know you had it in your mouth?

A. I think the reason for it that this gentleman had was that it was more convenient for disposal of it in the office environment.

242 Q. Have you ever heard the suggestion that young people find Skoal Bandits easier to use because you can't see that they are using the tobacco?

A. I am aware, I have seen those allegations in the press.

243 Q. I want to hand you a copy of an advertising or a sticker that appears on some of your, a sticker that appears on your Skoal Bandits boxes. It doesn't seem to be on the box we had this morning. Perhaps you could help me.

A. This was inside. I think this was inside the packet, available inside the packet. This was in the United Kingdom.

244 Q. But it is not on any of the packets you brought with you?

A. No.

245 Q. But, normally, there would be a piece of paper at the top?

A. No, this was done in the United Kingdom generally.

246 Q. They are on circular pieces of paper. Down on the right-hand side there is the Bandit's hat and it says, "The new way to enjoy tobacco"?

A. Yes.

247 Q. Let's just look there. There are three circles, the top right-hand circle - it is not that easy to read - "Skoal Bandits, you take a pouch....." (Quoted). "Getting used to Skoal Bandits". I want to look at the second half of this, "Like your first beer, Skoal Bandits.....tobacco satisfaction". (Quoted). Has that description the bearing of an addiction?

A. I don't know what you mean by that question.

248 Q. What do you think I might mean by the question?

A. All I can say is -

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249 Q. Which word do you find difficult?

A. "Bearing an addiction".

250 Q. Which word do you find difficulty with?

A. I find the phrase in its total difficult.

251 Q. You don't know what "bearing an addiction" means?

A. I can hypothesise a number -

MR. JUSTICE BLAYNEY: Perhaps you could mention them.

A. I assume the meaning, getting people into the habit of using the product.

MR. JUSTICE BLAYNEY: Isn't that the only meaning it could have?

A. That is my obvious interpretation.

252 Q. MR. GLEESON: There isn't any doubt about it, is there, Mr. Walter? And reference to the first beer - what is the typical age for people to start drinking at? People around school-leaving age?

A. I don't know. But one would assume that.

253 Q. You have no idea? This is a question for a layman like yourself -

A. Yes, but I have no absolute knowledge.

254 Q. I am not asking you for absolute knowledge, I am asking you to assist.

A. This hypothetically, the legal age in Britain is 18.

255 Q. Is that your answer?

A. Yes.

256 Q. You would like that answer to stand as to what you know about when young people start drinking?

A. I don't know.

257 Q. And the reference to the first beer, I want to suggest, is a reference which couldn't be directed to elderly people who have trouble with loose false teeth but a reference to tasting like your first beer, generally directed at people in their late teens - isn't that right?

A. I said that I think that the product was originally, one of the design concepts was for people with dentures and the convenient factors came in. When this particular product was launched in the early 80's, the portion snuff had been around for the best

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part of a decade. If somebody referred me in the context of "it is like getting used to your first beer"..... I can remember my first beer. It wasn't a taste that was a great taste. It takes a while.

258 Q. But isn't it an analogy to an experience that is undergone in your late teens or early 20's?

A. I quite agree.

259 Q. You say that your company has a policy of not selling this product or targeting it at young people?

A. People under the age of 18.

260 Q. Why is that?

A. It is a long-standing company policy. We believe tobacco to be an adult product.

261 Q. But why?

A. Because there is a long established custom of that fact and, in a lot of situations, there are also laws that pertain to it.

262 Q. Are there any other reasons why you don't sell tobacco to children? Is it just a matter of laws and customs? Why do you not sell tobacco to children?

A. Because we believe it to be a product that should be consumed by adults.

263 Q. Why?

A. Because, from my personal experience, custom has always dictated that. It is an adult product.

264 Q. Do you have any understanding of why the custom is that it is kept away from children? How has that custom grown up in European communities?

A. For the same reason as alcohol I would assume.

265 Q. What is that reason?

A. These are products which are deemed through their use to have some influence on the person who uses them. I have never really considered it beyond the customs and law.

266 Q. What sort of influence would there be from alcohol?

A. Drunkenness.

267 Q. Let's move to tobacco - what is the adverse influence that tobacco has on children?

A. I would say the company policy has been adopted through [illegible] the customs and law. That is

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attached to those two factors. I am not aware beyond that why the company policy exists at 18. I have taken that as enough for me.

268 Q. We are talking about the custom, which is the origin of your company policy - you have given evidence here and produced the samples and you told us that it is your policy not to sell tobacco to children; is that for nostalgic reasons or is there some rational basis for it? Why is tobacco not appropriate for children?

A. I can only answer it solely ..... In my experience within the company there are laws that set up the basis of many operations. Since I have been in the company the law is in effect and the custom is long-standing, and we have predicated our actions, and I have not thought beyond that.

269 Q. And you are not able to offer to the court any explanation for this custom?

A. No, other than that it has traditionally been seen as an adult product.

270 Q. And it is not anything other than that it is an obscure social convention?

A. I suppose one could put it that way, plus that laws exist.

271 Q. Has it ever crossed your mind that it might be harmful to people's health?

A. Generally, not in correlation to our age policy of 18.

272 Q. And you have never before that considered why tobacco is not customarily sold to children?

A. I would have accepted it as the right thing to do and have not bothered to go beyond that.

THE HEARING THEN ADJOURNED FOR LUNCH.

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THE COURT RESUMED AS FOLLOWS AT 2 O'CLOCK:

CONTINUATION OF CROSS-EXAMINATION OF MR. WALTERS BY MR. GLEESON:

273 Q. Mr. Walters, you let us have a copy of the sampling code, I think you described it as?

A. Yes.

274 Q. This was directed at the way sampling would occur. Is sampling a system of giving out free samples?

A. Yes.

275 Q. And it is a promotional device?

A. Yes.

276 Q. And you get a free Skoal Bandits to try?

A. Or whatever product is being sampled.

277 Q. And this is done on footpaths, for instance?

A. It can. It depends on the local law and ordnance and local situations.

278 Q. Five, "persons...traffic". (quoted). It is anticipated that these would be given out on the street.

A. I think that clause is included in case. I wouldn't say that is typical, but it is trying to cover all eventualities.

279 Q. And the next one, "Persons...." (Quoted) - what was in the author's mind for that?

A. These things come in cartons. Any packaging material removed should be disposed of properly. Where we sample, we don't want to leave unsightly litter.

280 Q. Was that the packaging only?

A. Any of it. There may be a leaflet.

281 Q. People spitting out the product on the ground?

A. I don't think.

282 Q. It is not that?

A. It could be said to cover that. But, I am not aware that it was written to cover that.

283 Q. That didn't cross your mind when it makes the reference to litter?

A. No.

284 Q. Is it your evidence that this code is observed? I want to put it to you that it is not always observed.

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A. I have no knowledge of it not being observed.

285 Q. Are you aware of the promotional videos being used in the United States in connection with marketing?

A. No, I have no knowledge of the domestic -

286 Q. Has your company produced videos for the marketing of this product or like products?

A. No, I have no knowledge of it. My knowledge is on the promotional activities to the European arena.#

287 Q. But I want to put it to you, you are not aware of any promotional videos?

A. I am not aware of any videos.

288 Q. Does the Irish company have on its staff any person, or in its officers, any person of scientific or medical competence?

A. The Irish company?

289 Q. The Irish company?

A. No.

290 Q. Does it have a person with any degree in science?

A. No.

291 Q. And it has no medical doctor?

A. No.

292 Q. Is there anyone on the staff of the Irish company or among those officers who has any qualification that might have anything to do with the point about health risks that is contended?

A. No.

293 Q. Has the Irish company ever addressed the distinctly Irish aspects of this product as, for example, the fact that moist snuff has no tradition in this country? Has that ever been addressed as an issue by the Irish company?

A. When you say "Addressed"?

294 Q. Taken into account?

A. I say...when the plan, looking at Ireland, was originally reviewed, I said that they looked at the tobacco usage patterns in Ireland.

295 Q. Is there anyone here who could tell us about that?

A. No.

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THE WITNESS WAS RE-EXAMINED AS FOLLOWS BY MR. FITZSIMONS:

296 Q. Just one matter, Mr. Walters. Reference has been made to the proposal from the Commission of the E.E.C. regarding the banning of oral smokeless tobacco. This proposal was, apparently, passed on the 14th of November 1990. Now, you are aware of the fact that the date was fixed for this hearing on the 18th of July 1990.

A. That is correct.

297 Q. And the date for the English hearing was also fixed for the 5th of November 1990.

A. Yes.

298 Q. And we have this Commission proposal coming out between the two on the 14th of November 1990, between the two hearing dates. Assuming, of course, something, a different matter entirely - that, ultimately, this becomes a Community measure and, therefore, Community policy - has the company received legal advice about that, that it may be able to challenge on grounds of proportionality?

A. Yes.

THE WITNESS THEN WITHDREW.

MR. GLEESON: That is My Friend's only witness for the moment. One of the parts of Mr. Fitzsimons' submission is, I accept, is that in terms of the protection of health value that is implicit in the Cassis Dijon decision and expands in Article 36, that the onus moves to me, so I propose now opening the State's case in relation to the matter as a whole, and then proceeding to some oral evidence in relation to the health issue. And, at the outset, I am also indebted to Mr. Fitzsimons for the lucid account he gave to the background to these questions with which we are faced. I may also say that, as I move through my submissions, that certain propositions which he put, for example the onus of proof I have just

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referred to and the direct applicability of Article 30, are not contentious, and I would hope to identify those shortly so that the issues would be narrower than when Mr. Fitzsimons started. I would like to deal with the issues in the reverse order. That is, the notification point and the labelling and the principal issue, the question of health. So, there will be three or four issues, first the notification issue and then the labelling and then moving into the mandatory requirements are the rule of reason, and then Article 36 and proportionality. And, again, Mr. Fitzsimons has eased my task in the sense that a number of cases I wish to direct attention to the court to have been opened already, but there are four or five other cases that I wish to open, and all of them - Article 30 and the question of public health - were examined. I think they are later cases than those indicated by Mr. Fitzsimons.

Now, looking at the notification directive: This is, as Your Lordship will recollect, is included in indent two of the book which My Friend put before the court. This is the book with the ten numbers on the right hand side and the provisions that require this matter to be notified. I hope there is a straight forward and simple answer to this. The first provision that I wish to direct Your Lordship's attention to is the nature of the propositions that are covered by the original notification directive, and that is Article 1/7 "Product". It is on page 82 of Mr. Fitzsimons' book. On the top right hand corner. "Industrially manufactured products....." (Quoted). There is no doubt that products for human consumption are excluded in the original definition. And I also accept that they are included by the amending provision to which I should now look. That is the next item in that book, and Your Lordship....the dates now will become important. Your Lordship will see that the Council Directive 182/88 - it is dated the 22nd of March 1988 - the legislation complained of came into force in the month of July 1988. But, if you look at the second page of that directive, that is Article 2, it provides at paragraph one of Article 2 that this directive does not become operational until at the outset the 1st of January 1989. That is the date on which it was adopted in this jurisdiction. "Member States....1st of January 1989" (Quoted).

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So, there is no breach can occur in the year 1988. There is no notification until 1989. And that is the simple and conclusive notification answer. There are one or two other answers, and I think perhaps the simplest is that this is very obviously not a directive of direct applicability, and I don't think it is necessary to open authorities to Your Lordship on this. Mr. Fitzsimons opened at least one authority, and let's say I am not unhappy with that. One of the distinct requirements for direct applicability is that it should give rise to individual rights, and I would submit that this is an organisation, an inter governmental requirement, and it is not intended to give rights. Very obviously, it is not intended to give rise to individual rights. It is controlling the way national standard authorities conduct their business and how they intersect and interact with each other. And Your Lordship will see in the original directive - that is the directive 189/83 - that is the one or indeed two that there are annexes to that, a list of institutions whose business is really governed by this; and it is instructive to look at the body that is designated for the United Kingdom and Ireland. Your Lordship will see that in the United Kingdom, on the left hand side, the second and the third down, the British Standards Institution -

MR. JUSTICE BLAYNEY: What are you looking at?

MR. GLEESON: The annex which is the last page. "Standards Institutions" is the list, and Your Lordship will see that there is a list for Standards Institutions for each country - the United Kingdom and the British Electro Technical Council and, in Ireland, it is the IIRS and the Electro Technical Council of Ireland, which is an off-shoot of the IIRS - but it is important that the court would recognise the character of this regulation, or this directive I should say, and that it is arranging affairs between Standards Institutions and it is not intended to give rise to individual rights, I would say, My Lord, therefore, that notification, we are not in breach of the notification, firstly, because it was not in force at the time this bill was promulgated; secondly, because this bill was not the sort of bill that is directly applicable and, thirdly, I would say - and in this, I run counter to an answer that was given to particulars, and insofar as

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I do I have to recede from that answer. AS a matter of law and irrespective of what seems to me to be an unhappiness in the State's pleadings, as a matter of law, I would respectfully submit to the court that the directive 83/189 deals with technical regulations, technical specifications, technical standards, and that Section 6 of the Act of 1988 is not any of those things.

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Now, as I say, it is necessary that I should acknowledge that the Reply to Particulars is misleading in that regard, and one can argue that one of the paragraphs of the defence is unclear, although what appears to be in the defence is a nullity because it doesn't make a point at all. But, no matter what I plead, I couldn't control the law. On the third leg of my argument, it is necessary to explore, if only briefly, what the directive 189/83 is all about; and I would say that what it is all about is that detailed technical, engineering or chemical specifications and standards which are applied to goods may disguise quantitative restrictions. And the purpose of the directive is to deal with that problem. And, if I can just look at the preamble to the directive and the recitals at the start? This is on the first page of the directive. The fourth and fifth paragraphs down, "Whereas..... technical regulations". (Quoted). And if I turn over the page to Article 1, and Your Lordship may ask what is meant by technical specifications and what is meant by what is set out in the first six numbers in paragraph 1 - I am saying that this is speaking in the language that the manager of the I.I.R.S. would understand and that the language of the paragraph is not directed..... The language of paragraph 6 is an unequivocable and uncomplicated ban on a perfectly understandable knowledge of the product, and that it doesn't partake of a part of the technical regulations, and that when you see what is envisaged by the directive as a whole, it can be readily appreciated that this is not a technical regulation. The scheme of the regulation is important. Basically, it involves this: that Ireland has a product, say, an agricultural pesticide and the statement is "You can't spray potatoes with the following concentration of chemicals" - that is likely to be formulated in a language which is legible to scientists only, and the directive very simply arranges that it should be submitted to all the scientific standards institutions and they are permitted an opportunity to make observations and so on. But, it couldn't have been the contemplation that something which does not speak in the language of scientists or standards institutions would come within this format, and if you look at Article 1 you see that at paragraph 1 "Technical specifications" - "A specification contained ..... required of a product". (Quoted). "Required of a product".

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That certainly doesn't happen here. Section 6 makes no requirement. Typically, this could be pasteurised milk not containing more than so many pathological micro-organisms or something like that. It refers to levels of quality and performance, something like a vaccine which is capable of killing so many micro-organisms within seven days or something like that.

"Safety dimensions..... methods". (Quoted). None of those have any application. "Testing packages....." (Quoted) - none of those arise.

Of course, there is a labelling controversy in relation to tobacco, but when you say "We ban it completely", labelling is no longer necessary. I say the general connection included in that is that you would expect horridly complex and - to a layman - information to be passing between the British Standards institutions and the I.I.R.S. and all these relative bodies, but it doesn't contemplate at all the simple, and, in Article 6, "Standards.... compulsory". (Quoted). These are the areas of the British Standards that apply in relation to all sorts of different standards, medical, three, "Standards....." (Quoted). This is the early warning system: that the I.I.R.S. are now going to move into dairy products for example. Four, "Draft...." (Quoted). Five, "Technical regulations..... technical specifications". (Quoted). So, I would say, My Lord, that this is not a technical standard. It is not something you would expect. It is not written in the language of a technical specification. It doesn't deal with the critical question of characteristics of terminology or performance or quality or safety. It doesn't say "So many parts per litre" or "Such and such a concentration is wrong", or that "The test has to be done according to the Irish standard that burns so many....." and so on. This is not directed at that sort of legislation. But, the notification is dealt with, I think, anyway, by the dates.

If I move from the notification question to the labelling directive - and this is the one that was enclosed with the loose-leaf at the back of the book we have been looking at. It is 622/89. Has Your Lordship a copy of that?

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MR. JUSTICE BLAYNEY: Yes.

MR. GLEESON: There are two aspects of that that I wish to direct Your Lordship's attention to. The first one which is, it seems an almost naive thing to say - is that it is about labelling and nothing else, and its title says that, "Council Directive...." (Quoted). It doesn't claim to be about anything else. It does claim to be about anything else. That would hardly need to be included, but it is included. It is about labelling and it is about nothing else. If Your Lordship looks at the recitals, the very first recital, it is clear that it is about labelling, "Whereas.....internal markets". (Quoted). So, it is about one question - labelling and the internal market - and nothing else. Moving to 8(2), which Mr. Fitzsimons has very fairly directed Your Lordship's attention to. Starting with 8(1) I suppose, "Member states may not ....." (Quoted). So, viewed through the labelling rules alone - which is the total perspective of this Directive - you may restrict the sale of the products; and two goes on to say "The provisions of this ..... in this directive". (Quoted). As I understand that provision, it says "As long as you obey these rules on the limited question of labelling, you may do as you wish...." (Quoted). That would be the problem.

Now, if I can turn then..... In the next part of my submission I will be broadly following the sort of sequence My Friend followed in his argument, and I would like to start by identifying the couple of propositions which he advanced, which I don't wish to argue against. And the first is that Mr. Fitzsimons says that Article 30 has direct effect on the member states, and I don't dissent from that. That is not necessarily for it to be an appreciable effect on the member states. So far as that is put by Mr. Fitzsimons, I don't wish to argue against that. That the ban can be seen as a quantitative restriction, I accept that that is one perspective. That - I will come to the rule of reason in due course - but that recourse to the rule of reason is subject to the rule of proportionality. I accept that. And that Article 36, that invoking an Article 36 Section, the burden rests on the party proposing - the State - I accept that. My Friend cited

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authorities for those propositions and it won't be necessary for me to go into those any further.

Turning now to the health argument. I would say that a fundamental misconception on the part of the plaintiffs in this case is the suggestion that where a product is authoritatively thought - not definitively proved - authoritatively thought to carry a danger to human life, that the mere fact that other dangerous products are differently dealt with, is an argument for something less than a ban on this product - I would say that is not a logical proposition. My Friend contends that - what I would call the regime of protection against cigarettes - would be adequate, but that is not the test. Underlying this whole business is the factual background which will be adverted to by my witnesses. Smoking cigarettes expanded greatly in the earlier part of this century amongst men and towards the end of that period amongst women. I suppose the 20's and the 30's for the men and the 40's the women. And that has been followed on many years later with an explosion of lung cancer, firstly in men and then in women. And the difference between the product which is the subject matter of these proceedings and cigarettes is that cigarettes are a deeply ingrained habit and that what is possible in common sense terms or in the rule of reason terms in respect of cigarettes is not the same as what is possible in respect of a new product which has no track record in this country. If you ban cigarettes tomorrow morning, very large numbers of nicotine addicts will be adversely affected. Whether that would be a correct thing to do or not, I am not going to express any view on it.

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The banning on the product in this case, there is no such adverse consequence. In the language of the press release which we looked at before lunch, if cigarettes were being introduced now and all that is known about them was known now, if they were being introduced for the first time, it is exceedingly probably they wouldn't be permitted. It is a very different matter to unpick what is there in the fabric of living, but the position is quite different where a novel harmful product is sought to be introduced, and I would put the matter this way - that many public health authorities, many has not choice, no choice, but to ban a product that comes with the information which we have available to us about Skoal Bandits and cigarettes, and that it is entirely misdirected to say "Of course, if you have very strict advertising restrictions, that will do". This is a product which was developed in Sweden where other ways of using oral snuff was, apparently, in place for many years, and the scientific evidence available to the State is that nicotine forms an addiction and that the addiction can lead to use which is hard to stop and that, in turn, in some cases leads to oral cancer which can be fatal. There is no established clientele in this country for this product. There are no habituaries or addictions yet. And, when I come to the rule of reason, I will suggest to Your Lordship that it is a matter of simplest common sense that you would expect any public health officer anywhere in the world to recognise that where he has the opportunity to intercept at its inception the propagation of the habit which has no claimed positive advantages or claims any nutritious advantages and which has widely promulgated disadvantages - and "Disadvantages" surely is a gross understatement here - where it says that it leads to death of humans, and very painful death, that it would be a dereliction of duty for any public health authority to say "Yes, we will let this in but we will try to keep the consumption down". I would like to say something about the scientific controversy. My Friend referred to a graduation of response to new products and he detected a different inference to the warnings. But, he also suggested that, deriving from that, there should be a range of controls for products which "Might kill you", "Probably will kill you" and "Will certainly kill you"; and that product which only might kill you might, in fact, be properly dealt with in a public

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health sense by "Admitting it but not letting it be sold very strongly". I want to draw an important distinction. Many, many of the scientific controversies which arise in the European juris prudence on proportionality involve the following question - a small perceived health risk counter balanced against some positive value or need. To give an example, pesticides on apples. That is assumed, there is a case for pesticides on apples - let's assume that apples are an important part of the national diet in France and that a pesticide is highly effective for keeping parasites away from apples, preserving the crop, and so on, and that it immensely increases the value of the apples and that the price to the customer is to be kept down, but there is a small risk of tooth decay or indigestion. It may well then be fine a question of scientific controversy on proportionality. This is not such a case. There is no counter balancing, and there is a large risk. It is not a small risk of tooth decay or indigestion or something of that kind. It is a risk of death. That sounds dramatic, but I don't know any other word to describe it. That is what the literature says, and it has to be said plainly. And it appears to me that no argument can be advanced to say that a ban in those circumstances is other than on proportionality. Indeed, it seems to me that a public health authority who say "We are faced with this product, we are told by numerous reputable scientific authorities that it probably causes oral cancer and probably causes premature death in some cases", any health authority who deals with that proposition in respect of a product for which there is no nutritious or technological need would be acting in a grossly disproportionate or not proportionate way by not banning it. It has to be banned. A public health officer faced with that question has only one answer. Their custodians of public health are not to be enforced into nice or fine calculations of risks where there is no counter balancing value. The problem, as I say, is much more complicated where there are otherwise beneficial features. I suppose the best example of that would be new drug preparations where some unpleasant disease or medical condition is ameliorated or possibly cured by a drug which is known to have disadvantages. Some drugs that are good at curing cancer have horrible side effects. Or, as I say, a pesticide or a fungus or a fertiliser - something that will make the potatoes grow twice as

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big but has a danger of causing premature baldness, that is the sort of risk that can be taken, and if there is a medicinal or environmental or nutritional need to be met, then there may be a problem. But here is a circumstance where there is nothing at all to go into the hand of the weighing scales. You have all these disadvantages and no claim of social or nutritious or environmental advantages. Where the product can be charitably described as a leisure product, no level of risk is acceptable, and certainly not the level of risk which dealt with in the wealth of literature which is synopsised in the general surgeon's report and the WHO study. The scientific controversy seems to me, in the present case, to be in the following terms: it may kill you but then again it may not. It may cause oral cancer but then again it may not. It may cause oral diseases but then again it may not. Some scientists think it does kill you and that it does cause oral cancer. Some scientists say it is not proven. The only option open to a public health authority faced with that sort of scientific controversy in respect of this sort of product is to ban it.

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Imagine another leisure product, one for which there is no need for, but which some people need in enhancing their leisure, sweets. I suppose toys is another example, as Mr. Fitzsimons said. Let's say a new brand of sweets are introduced about which it's the following scientific controversy: "They may kill you but they may not. The Surgeon General or the United States thinks they give you cancer of the mouth. The W.H.O. think they should be banned because they believe they cause oral cancer, believe they cause premature death and nicotine addiction, these sweets". Is it conceivable that any health authority adopting common sense, merely because they are non-scientific people or because they have read the decision in Cassis Dijon, is it conceivable that any other option is open? And that is why the rule of reason has a rule in this case, because there has never been a clearer case. When all the complexes and ornaments and juris prudence is taken away from this case at the end of the day, there is a very simple decision of common sense and justice to be made, and happily it is being simplified by the juris prudence of the European Court under the rule of reason. And, as I say, it is not in any sense a fine question or a question that will need heart-searching by judges who say "I am not a scientist". Could any health officer be criticised by banning these anywhere? And I say no. And if Your Lordship decides on that, then it seems to me that the matter is put beyond controversy, and I adopt the same diffidence that My Friend, Mr. Fitzsimons, expressed in relation to suggesting any view to the court as to whether a reference is appropriate, but I would suggest that a reference is not needed. It is a clear event and clear question. It is that rare thing in litigation, a straightforward case. I will just return again to the question that because equally or more dangerous products than tobacco are banned you can't ban this product. The proportionality is between the objects and the preservation of human life and health, and it means the ban of a new dangerous unneeded product. Preservation of human life and health is one thing, and the ban on a new unneeded product..... New in the sense that there is no future environmental, nutritional necessity and new in the sense that it is not part of an Irish tradition. How other dangerous products are treated tells us nothing about proportionality. If ten new pesticides of a particular chemical composition are

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introduced and a public health authority in the country bans nine of them and omits to ban the tenth, there is no argument on proportionality that the first nine banned are a mistake, if they are justifiably scientific in language. The fact of not banning all ten is not a logical argument for banning all ten. And I say that is a breach of the rule of reason to say that "There are more dangerous things still in circulation". Nothing could ever be banned if that was the test. You have to start somewhere, and the first banning will leave more other dangerous things banned. It is not a requirement that you should start with the most dangerous and work religiously down the list. That test tells us nothing.

And if I can turn now to the cases, but before I do, if I could just offer Your Lordship - in relation to the rule of reason - what seems to me to be a relatively convenient summary from Halsbury in relation to the rule of reason and how it is characterised and because it is slightly an elusive concept. I have the full volume, if Your Lordship requires it. At 1283 in Volume 52. I think Volume 52, My Lord, dates from 1986, and I have looked at the consolidated one, and it seems to me there is nothing material advanced in the general description. "The rule of reason..... Community level". (Quoted). In the light of the information disclosed this morning, I would say that that is absolutely what we're talking about here. "Measures which themselves..... conclusive". (Quoted). There is no doubt that this is a measure of equal applicability. "Further....." (Quoted). And I accept that. If you are going to insure that no Irish person runs the risk of getting oral cancer from a Skoal Bandits then ban it, and nothing short of that will address that. It is not a complex proposition at all. "The rule of reason may, therefore, ... concerned". (Quoted).

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MR. GLEESON: I move now to 1284 which is the next succeeding paragraph, I am not going to open the notes My Lord. 1284, interest or values falling within the rule of reason. It's just on the next page "the interest or values", this is paragraph, 12, 1984, "which are capable of benefiting from the...." (quoted). And I accept that.

And then, My Lord, there is a consideration of different interests which are thought to come under this and we are not concerned with consumer protection, at least not in the narrow sense and nor the next one which is "the...." (quoted).

And then we are concerned with 1288 which is the protection of public health. The protection of public health has been referred to on several occasions. (Quoted).

That is a comment which certainly one can see the sense of. The fact is, however, that public health has been taken on board superfluous or not, taken on board as a rule of reasoning value, if I put it that way.

And I think it may have this legitimacy, My Lord, that slightly different tests may apply in posing the rule of reason as opposed to using Article 36 and I will come to that in a moment.

Then the question of environmental protection, these are other rule of reason values, in 1288, 1289, recoupment of working conditions, 1290, we are not concerned with any of those values here and then there is a mere exended discussion at 1291 of the rule of reason in Article 36. "Because the rule of reason does not find it's legal basis in Article 36 of the E.E.C. treaty...." (quoted).

And this is why I say that there may be a reason, may be a justification for having held public health as a value both under the rule of reason and under Article 36. "Both the rule of reason and the justification as mentioned in Article 36 are subject to the...." (quoted).

There could be no more public or general interest than the matter of preserving human life. And in a sense, here is the niche within which the jurists of the community have found it appropriate to recognize and acknowledge that values such as human life do figure in the pantheon of values which they are enjoined to enforce and that there is room for values as basic as that. "Thus the prohibition in any shape [illegible] (quoted). And that concludes the

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reference that I want to make to that aspect.
But I think that the best designation or characterisation of rule may well be the one referred to my Mr. Fitzsimons. It's common sense. There are products.
There are products whose trade you can ban on public health grounds under Article 30, I would say without recourse to anything more than that, and this is one. Obviously there are probably products which are more dangerous and products that are less dangerous that you could think of. Obviously prohibited drugs, the more serious prohibited drugs would, in my view, fail to past rule of reason, trading in hallucinogents would not be permitted, perhaps, trade in unregulated intoxicating liquor, poiteen being one of them. But there does seem to be other products, leisure products of no known social utility which are dangerous and which common sense says should not be permitted to avail of the fundamental free trade requirement.
Now, I am going to refer, My Lord, very briefly to some of the cases, some of the cases which my friend opened already and I will try and do that speedily and then I will refer to a smaller number of additional cases myself.
And in relation to the rule of reason I would simply mention again Case 12 and Case 17 are relevant. And I will just turn to Case 12. This is in Mr. Fitzsimons big book, My Lord.

MR. JUSTICE BLAYNEY: Yes.

MR. GLEESON: At page 662 of the report. The paragraph number hasn't copied out very well on that page. But page 662 in the middle of the page. "In the absence of common rules...." (quoted).
And that is exactly, I am sorry, My Lord, perhaps, it's page 662 of the report.

MR. JUSTICE BLAYNEY: Yes, I have it.

MR. GLEESON: And I think it's probably paragraph 8, My Lord. "In the absence of common rules relating to the production of....." (quoted).
And let me just pause there. That seems to be the point that we are at in this controversy in as far as the Europeans organs are concerned, it's in relation to a proposal not yet enacted. "obstacles...." (quoted).
And turning then to 19, Case 19 in the book and to [illegible] case 19 is the Commission and Italy, 1982,

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ECR reports. And looking at paragraph 26, towards the end of the judgment.

MR. JUSTICE BLAYNEY: Sorry?

MR. GLEESON: Paragraph 26, My Lord. "The Italian Government further contends....." (quoted). Now, this is an authority that Mr. Fitzsimons advanced for the proposition that you have to strictly construe the application of the rule of reason. I fully accept that it has to be strictly construed in the sense that it doesn't extend to things like deposit regulations which is what this case was about.

But it seems to me that the facts of this case are so extraordinarily removed from anything that would come in under the necessarily limited application of the rule of reason, it has to be very very transparent to come in under the rule of reason, I would say, and the rather brave, sporting attempt of the Italian to say that the their deposit regulations came under the rule of reason questions because it was an attempt to curtail the Italian currency is not surprising.

And looking back once more at case 17, that's the case of Gilli, and referring Your Lordship to paragraphs 5 and 6, "the absence of common rules relating to the production...." (quoted).

And then in 6, "it is only where national rules which apply without....." (quoted).

I say this is an imperative requirement. There are no difficulties with individual, no difficulties with that test. An imperative requirement.

And then going to the question of proportionality, and I first turn to case number 5 in Mr. Fitzsimons' book, paragraphs, this is the case of the Piper, and looking at paragraphs 15, 16 and 17. Mr. Fitzsimons already read these. I'd just be anxious to emphasize them again. Starting on page 635 of the internal pagination of the report. "Health and the life of humans", 635 at the foot of the page, the last paragraph. "Health and the life of humans rank first...." (quoted).

And that's an important statement from my point of view. "And it is for Member States...." (quoted).

And over the page, "Nevertheless it emerges from Article 36....." (quoted).

Let me just pause there. If you go down the road suggested by the plaintiffs and you bring in these products and don't - - them, don't tell sell them to children, restrict them from being chewed in buses

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and so on, you are still going to find yourself, if you sell them at all, with a population which maybe restricted but are now exposed to a risk of oral cancer. And I do not understand how that could be thought to be a responsible exercise of the public health obligation.

And moving then to Case 21, if you can look, this is the an unpronounceable one. I will just call it Case 21 and move to paragraph 12. In this regard, that's at page 3972 of the report in it's internal pagination. 3972. "In this regard it must be recalled...." (quoted).

If it has a choice. There is no choice. There is no other - that will attain the same objective, the objective being to ensure that no Irish person contracts oral cancer or any of the other oral problems as a result of use of this product.

You see, I will just go back again to the public health, public health is something that has to happen now. It cannot await scientific certainty. I think that's an important value to bear in mind.

Human knowledge is very incomplete of the two and half thousand odd substances thought to be involved in tobacco smoke. About 50 have been analyzed and tested. But the public health cannot say we will wait for another 80 years. It's todays consumer he must note. And he has to take scientific knowledge and it's defects and gaps as he finds them.

Mr Walter would say it has never been proven, I don't accept this, but what he would say is it has never been proven that they are a cause of disease. But that is to require of public health authorities a level of proof which is entirely unrealistic and which is, which would constrain public health authorities in a way that would make it -.

The scientific controversy is as to the risk to health and Mr. Fitzsimons yesterday said if it is not proved to be a health risk the case is not made out. Well, it seems to me there is something in that.

A health risk. We don't have to prove that it definitely damages health, we say that it does, but we must prove that it is a risk, it involves risks. That the chances are alterable(?). And that is very different from the sort of proof that Mr Walter seemed to provide.

And we would say that it is proved to be a health risk. It is proved to be a health danger. That's not to say that it would affect everybody. So the

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proof is one of risk. What we must prove is that there is risk. What the literature does establish is that there is a risk.

And Mr. Fitzsimons went on to say that even if there was no scientific controversy, the ban would be disproportionate. That's the most breathtaking submission. That Your Lordship were to conclude that there is no scientific controversy, that the evidence is all one way, that this does kill, that the ban would be disproportionate. I am unable to appreciate the logic of that.

Now I'd like to turn to Case 26, if I can, at this stage, that's Bennekom, and to look at paragraphs 37, 38 and they are at page 3904 of the book, on the right-hand side, My Lord, on the right-hand side of the page. "In a consistant line of decision the court has stated that...." And this is of some importance, "that in as far as....." (quoted).

And moving on from that to Case 24, My Lord, Sandoz Case, paragraph 16, again a reference at page 2463, paragraph 16, to scientific certainty. "As the court found in it's judgment in the case.....", (quoted). Well, I think that is well established by now.

I want, My Lord, to move now to a couple of extra cases that I want to draw to the courts attention. And one of the features of them which I want to draw to the courts attention, it runs through all the cases cited so far and all the cases yet to be cited, I think, is the fact that the present case is unique on it's facts and outside all the other cases because there is no claimed utility for the product which carries with it the danger.

If you are talking about a pesticide, of vitamin tablets, of food additives or drugs, they all have some sort of countervailing advantage, some sort of countervailing saving aspect to them. And there is a specific reference in some of the cases I am going to draw Your Lordships attention to products which are being tested on the public health ground that the court should have in mind the need which they fulfill, some important technological need or nutrition. There will be cases My Lord, and I am not sure if they are in order, but I hand Your Lordship a set and my friends as well. (Document handed to Mr. Justice Blayney).

The first case, My Lord, that I'd like to mention Medcuni. That's reported at 1984, European Court Reports 2 0 2367. That's proceedings against Medcuni.

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I think that's the largest of the Dutch dairy co-ops, I think. And it's concerned with a ban on pasteurized milk in the Dutch milk order, or rather a ban on milk pasteurized from sources blow certain levels. The process of pasteurization of milk involves treating it in one way, usually by heat so as to kill pathogenic milk organisms to a certain level and the tests can be different and it's usually expressed in terms of the number of pathogenic micro-organisms which will be left untreated and I think that the Dutch standard is not less than, there should be not more than 50 thousand per milliliter. But it doesn't matter. There was a standard and a ban if you were worse than the standard. If your milk was less cleansed, less pasteurized than the standard, then it was banned.

Now, at a very fundamental level I'd say, My Lord, if you can ban milk that's not pasteurized above a certain level, even if, half the population of Ireland were drinking raw milk, I suppose, 40 years ago and up to 15 years ago a significant number of the population were not yet drinking pasteurized milk, it seems likely that you can ban the Skoal Bandits.

And if I can look in the first instance to the level of pasteurization, the typical effect of unpasteurized milk would be to upset the digestive system, and I think the arguements in favour of pasteurization have always been the most sensitive people in the community are the most likely to get sick from unpasteurized milk, pregnant women, and babies being the people who would get upset by milk that hasn't been more properly treated. People of more robust digestion would not be affected so much. And the pasteurization standard here was a high one, one geared to the most sensitive members of community, to the small babies and to the delicately balanced digestions, old and sick people, and that was upheld.

Now, just looking at paragraph 12, at page 2384 of that judgment. The "second question" it's headed. Half way through the report, I'd say. 2394 is the page number at the bottom. "The second question". Does Your Lordship see that? "According to a consistant line of....." (quoted).

I think that's an interesting formulation. "Just as effectively". Now, is it open to your Lordship to say, on the evidence signified, I will be putting

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before you, accept for the moment, the sort of view that is expressed in the statement by the Commission this month, can it be said that if you simply restrict the advertising and sell these only to mature adults that are able to make a choice, that human life and health can be protected just as effectively as if you ban them? I say you cannot. That is a less effective protection and that there is nothing complicated in that question which I adopt explicitly from that judgment.

So then I would formulate the question as this. Is the cigarette protection regime deriving from the regulations and rules described by Mr. Fitzsimons, is that just as effective for the protection of human health in respect of Skoal Bandits as banning them? And it seems to me to be a proposition of almost mathematical clarity, that it is not. And that if you increase by one the number of Irish consumers of Skoal Bandits, that you have a less effective regime for protecting life and death.

And looking across the page to paragraph 15, "As regards the rules laid down by the milk order....." (quoted).

And turning over the page, My Lord, to the next page, the top of it, "Secondly, the data available at the present stage of scientific research....." (quoted). We have a choice. "In those circumstances...." (quoted).

Now there was a ban on milk of a certain character and the standard imposed was a ban on milk which fell below the test appropriate for the most sensitive members of the community and it was held legitimate for that purpose. And the matter was put the same way, paragraph 20, My Lord, on that page. "The second question therefore must be answered as follows...." (quoted) "Which may present a risk". That's the test. "Which may present a risk to the health of the most sensitive of consumers". And may present a risk. (continued quote).

And I say what's important there is that a very sensitive level was accepted. The test was whether that may pose a risk to the most sensitive people. And if you can have that sort of a ban, you can certainly ban any tobacco product.

The next case is Neirqua(?). That's 1986, European Court Reports, 1067. This is a case about a ban on food treated by particular pesticides, something called [illegible] And the ban was health. The

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summary at the start, the very first paragraph in the report seems to me to be constructive. "In insofar as the relevant community rules do not cover certain pesticides.....".

Now here is a case where you have regulation of some products, but not others. "The regulations..... " (quoted).

I turn then to paragraph 13 on page 1078 of the report. "However as the court pointed out in it's judgment of 19th of September 1984....." (quoted).

MR. JUSTICE BLAYNEY: Sorry, Mr. Gleeson?

MR. GLEESON: Page 1078, paragraph 12 towards the bottom on the lefthand side. "As the court pointed out in the....." (quoted).

Now there is the court looking at both sides of the coin, as it were, the positive advantage and the negative feature, and I say that's a very important matter in this case, because no socially useful advantage can be - -. "The fact that the....." (quoted).

And again we can't either predict or control how many Skoal Bandits somebody is going to take on board. They may have a number of them in their mouths 7 days of the week, for all we know. It's not something that you can ration. "Can neither be predicted nor controlled...." (quoted).

I will move on from that to the next case which is Layon Mothe(?), that's the State and Layon Mothe. That's a Belgian case and that's reported, My Lord, 1987, 1 Common Market Law Reports, 663. And the first page, the second paragraph, Constitutional Law, occupied field, community legislation, directives, imports, protection of health. "The existance of harmonizing directives does not as such....." (quoted).

And I do emphasise all those words because I say harmonization extends to the labels only. "Full measures....." (quoted).

So it isn't really operative and the harmonization in this area has occurred simply on the fringe. And if I can turn then, My Lord, to, I think it's in the, it's the third last page, it's the second last page of all the pages that I have given Your Lordship, page 680 of the judgment. Page 680 of the report, I should say. This is at paragraph 16, referring to Articles 30 and 36. "As regards those articles, the court has consistantly held on the one hand..... "

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I think this was a case about colour being applied to, in one jurisdiction, to a roe of fish which was potted. Only a small degree of community harmonization is being achieved. (continued quote). And then the next paragraph, I think, is of some importance. "Although for those purposes Member States must take into accounts the results of international scientific research." And I do mark that because I think that's the first time we have had that quotation.

So it is for this state, in deciding those purposes, to take that into account "and in particular the work of communities scientific...." (quoted). Now I would say that last sentence clearly indicates that local responsibility is what applies, apart from labelling.

Now perhaps I can then go to the answer to the question, over the page, at paragraph 25. "In reply to the question referred to the court by the....." (quoted).

Those factors are interesting, it seems. I will just go over that again. "Do not preclude national provisions which require....." (quoted).

Now necessity, value and suitability of use seem to me to be matters which nought out of a hundred can be entered against the products presently in prospect. "However in appliance of provisions....." (quoted). Which is not the case here because they are not authorised in the U.K., "must authorize....." (quoted).

Let me just draw that to Your Lordships attention. Just going over that second paragraph again. "However in appliance of provisions....." (quoted). I would translate that as moist snuff consuming habits in the importing state. None at all being the moist snuff consuming habit. "It corresponds to a real need". No need at all is what I would say. But the reference to "real need" is a very, very important part of this. "And in the appraisal....." (quoted).

But the analysis there revolving around the question of a real need is one which I think is particularly appropriate to the facts of the present case. And the last of the, that was a colourant.

The last of the cases is an additive case. It's Claude Muler and others, and it's the use of an additive, polyglycocoll something or other, which was [illegible] as a pellulising or stabilising agent in the

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process.
And I will just turn, My Lord, toward the end of judgment, to the third last page, 1526 is the pagination of the report. At the right-hand side at the foot of the page, paragraph 20. "It's necessary to point out first of all that the parties are agreed that although the substances referred to..... " (quoted).
Can I say, My Lord, that everywhere scientific uncertainty is mentioned it is mentioned in the context as being a reason for being careful and prudent and restrictive and not a reason for taking the shackles off, which seems to be the use which the applicants or plaintiffs seem to make of scientific uncertainty in the present case. Scientific uncertainty enhances rather than diminishes the case. "As the court has held....." (quoted).
And then a across the page, My Lord, top 3 paragraphs, I think, are relevant, at paragraph 24, My Lord, at page 1529. "It is for the Member States to consider in the context...." (quoted).
Now I think there are three elements there that I want to draw Your Lordships attention to. Firstly, whether there is a real need for the additives. Is there a real need for Skoal Bandits. In applying those criteria they "must take account of...." (quoted).
I understand that to mean that in the population of one of the European States is addicted to eating the roe of a particular fish and that it forms a part of diet and may provide a lot of coating for a certain part of the population and if really they do like it with this additive or colourant in it and they wouldn't eat it without it, then there may be a real argument. No such argument can be be made in this. So the elements to which I draw attention to are the real need, the scientific research and the prevailing eating habits which I transpose in the present case to the prevailing habit of consumption of oral moist snuff in Ireland, namely no habit at all. There is no pattern established.
The next paragraph is important. "It is...." (quoted). So there is a element.

MR. JUSTICE BLAYNEY: There is "not".

MR. GLEESON: "Does not meet a real need". And that is what I would say we are demonstrating here. There is no need, no demand, no social necessity, no [illegible] necessity and there is even more vast

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formulation on a more critical issue in the next paragraph. Of all the cases I think that this is perhaps the one I particularly emphasise. "For those reasons the answers to the....." (quoted), and these are the words "no danger to public health". So there is a test. You have to allow it in if it means a genuine need and presents no danger to public health. And that's a very convenient statement of when Mr. Fitzsimons will be able to succeed, where he'll be able to succeed, where his clients will be able to succeed, when they will be able to meet that test, when they can show that there is no danger to public health.

And in those circumstances I would say that there is no case. Those are the authorities.

I appreciate it's nearly 4 o'clock but it occurs to me, My Lord, this if I call my first witness and he delivers an important piece of documentary evidence it may shorten some of the time, if I can just call Dr. Walsh and ask him to prove a particular document and it may shorten things tomorrow morning.

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MR. FITZSIMONS: Before Dr. Walsh gives evidence and as a result or consequent upon my friends submissions it appears to me that we find ourselves now in a situation where the question of necessity for any oral evidence on either side must be considered or Your Lordship might consider the issue. My friend appears to accept on the basis of his opening that there is a scientific controversy on this topic. Obviously his clients do not accept the body of opinion that goes against the authoritative body of opinion to which he referred and that being the situation, My Lord, the question arises as to what is the purpose of any evidence from this point on onwards.

Your Lordship has the situation in a nutshell, so to speak, and we have accepted, as I said earlier, in our pleadings that the Minister acted, the State acted in enacting this measure in good faith and on the basis of the body of opinion that Mr. Gleeson has referred to, and there is no issue on that question, My Lord, Mr. Gleeson accepts that there is a scientific controversy.

MR. JUSTICE BLAYNEY: Yes, but Mr. Fitzsimons, I can't simply proceed on the basis that there is a scientific controversy without knowing what it is. In other words I must have evidence in regard to that.

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